

CARL J. KUNASEK
CHAIRMAN
JIM IRVIN
COMMISSIONER
WILLIAM A. MUNDELL
COMMISSIONER



0000000042

ARIZONA CORPORATION COMMISSION

DATE: October 18, 2000

DOCKET NO.: T-03631A-98-0540

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Alicia Grantham. The recommendation has been filed in the form of an Order on:

ERNEST COMMUNICATIONS, INC.
(CC&N/RESELLER)


Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

OCTOBER 26, 2000

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

NOVEMBER 7, 2000 AND NOVEMBER 8, 2000

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250.


BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 CARL J. KUNASEK
CHAIRMAN

3 JIM IRVIN
COMMISSIONER
4 WILLIAM A. MUNDELL
COMMISSIONER

5
6 IN THE MATTER OF THE APPLICATION OF
ERNEST COMMUNICATIONS, INC. FOR A
7 CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE COMPETITIVE
8 RESOLD LOCAL EXCHANGE
TELECOMMUNICATIONS SERVICES

DOCKET NO. T-03631A-98-0540

DECISION NO. _____

ORDER

9 Open Meeting
10 November 7 and 8, 2000
Phoenix, Arizona

11 **BY THE COMMISSION:**

12 **DISCUSSION**

13 On August 29, 2000, the Arizona Court of Appeals, Division One ("Court") issued its
14 Opinion in Cause No. 1 CA-CV 98-0672 ("Opinion"). The Court determined that Article XV,
15 Section 14 of the Arizona Constitution requires the Arizona Corporation Commission
16 ("Commission") to "determine fair value rate base for all public service corporations in Arizona prior
17 to setting their rates and charges." Although that Opinion will more than likely be appealed to the
18 Arizona Supreme Court, we are concerned that the Opinion might create uncertainty in the
19 competitive telecommunications industry during the review period. On September 12, 2000, the
20 Commission ordered the Hearing Division to open a new generic docket to obtain comments on
21 procedures to insure compliance with the Constitution should the ultimate decision of the Supreme
22 Court affirm the Court's interpretation of Section 14. The Commission also expressed concerns that
23 the cost and complexity of FVRB determinations must not offend the Telecommunications Act of
24 1996.

25 Based on the above, we will approve the application of Ernest Communications, Inc.
26 ("Ernest" or "Applicant") at this time with the understanding that it may subsequently have to be
27 amended to comply with the law after the exhaustion of all appeals.
28

1 Having considered the entire record herein and being fully advised in the premises, the
2 Commission finds, concludes, and orders that:

3 **FINDINGS OF FACT**

4 1. On September 24, 1998, Applicant filed with Docket Control of the Commission an
5 application for a Certificate of Convenience and Necessity ("Certificate") to provide competitive
6 resold local exchange telecommunications services within the State of Arizona.

7 2. In Decision No. 58926 (December 22, 1994), the Commission found that resold
8 telecommunications providers ("resellers") were public service corporations subject to the
9 jurisdiction of the Commission.

10 3. Applicant is a Georgia corporation authorized to do business in Arizona since 1998.

11 4. Applicant is a reseller of telecommunications services purchased from Qwest.

12 5. On June 19, 2000, the Commissions Utilities Division Staff ("Staff") filed a Staff
13 Report. On September 8, 2000, Staff filed an Amended Staff Report.

14 6. In the September 8, 2000 Staff Report, Staff stated that the Applicant provided its
15 financial statements for the year ended December 31, 1999. These financial statements list assets of
16 \$594,000, negative retained earnings of \$833,000, and shareholders' equity of \$70,000. In addition,
17 Applicant had a net loss of \$833,500 on revenues of \$397,000. Based on the foregoing, Staff
18 believes that Applicant lacks adequate financial resources to be allowed to charge customers any
19 prepayments, advances or deposits absent the procurement of a performance bond. Staff also
20 believes that measures should be taken to ensure that the Applicant will not discontinue service to its
21 customers without first complying with A.A.C. R14-2-1107. Staff believes that if the Applicant
22 experiences financial difficulty, there should be minimal impact to its customers. Customers are able
23 to dial another reseller or facilities-based provider to switch to another company.

24 7. The Staff Report stated that Applicant has no market power and the reasonableness of
25 its rates would be evaluated in a market with numerous competitors.

26 8. Staff recommended the following:

27 ...

28 ...

1 a. That the Applicant procure a performance bond in an amount sufficient to
2 cover 60 days revenue from its customers, as well as any prepayments or deposits
3 collected from its customers;

4 b. That the amount of the performance bond be increased if at any time it would
5 be insufficient to cover the aforementioned requirement;

6 c. That if the Applicant desires to discontinue service it file an application with
7 the Commission pursuant to A.A.C. R14-2-1107;

8 d. That the Applicant be required to notify each of its customers and the
9 Commission 30 days prior to filing an application to discontinue service pursuant to
10 A.A.C. R14-2-1107;

11 e. That failure to meet the above requirement shall result in forfeiture of the
12 Applicant's performance bond;

13 f. That proof of the performance bond must be docketed at least 30 days prior to
14 the Applicant's initial offering of service.

15 9. Staff further recommended that Applicant be required to file a complete set of tariffs
16 within 30 days of an Order in this matter and in accordance with the Decision.

17 10. Staff recommended that Applicant be required to notify the Commission immediately
18 upon changes to the Applicant's address or telephone number.

19 11. Staff further recommended:

20 (a) If at some future date, the Applicant wants to charge customers any
21 prepayments, advances or deposits, it must file information with the Commission that
22 demonstrates the Applicant's financial viability. Upon receipt of such filing, Staff will
23 review the information and the Commission will make a determination concerning the
24 Applicant's financial viability and whether customer prepayments, advances or
25 deposits should be allowed;

26 (b) The Applicant's local exchange service offerings should be classified as
27 competitive pursuant to A.A.C. R14-2-1108;

28 (c) Applicant's competitive services should be priced at the rates proposed by the
Applicant in its most recently filed tariffs. The maximum rates for these services
should be the maximum rates proposed by the Applicant in its tariffs. The minimum
rates for the Applicant's competitive services should be the Applicant's long run
incremental costs of providing those services as set forth in A.A.C. R14-2-1109;

(d) In the event that the Applicant states only one rate in its tariff for a competitive
service, the rate stated should be the effective (actual) price to be charged for the
service as well as the service's maximum rate;

1 (e) Applicant's application be approved without a hearing pursuant to A.R.S. §40-
2 282.

3 12. On October 10, 2000, the Applicant filed affidavits indicating that it published notice
4 of its filing in all counties where service is to be provided.

5 13. No exceptions were filed to the Staff Report, nor did any party request that a hearing
6 be set.

7 14. On August 29, 2000, the Court issued its Opinion in US WEST Communications, Inc.
8 v. Arizona Corporation Commission, 1 CA-CV 98-0672, holding that "the Arizona Constitution
9 requires the Commission to determine fair value rate bases for all public service corporations in
10 Arizona prior to setting their rates and charges."

11 15. Although the Commission believes that the law is not settled on this issue, Applicant
12 should have the opportunity to submit fair value information, if it so chooses.

13 16. On September 12, 2000, the Commission ordered a Generic Docket to be opened to
14 take comments from any interested parties concerning any procedures that should be adopted as a
15 result of the Court's Decision.

16 CONCLUSIONS OF LAW

17 1. Applicant is a public service corporation within the meaning of Article XV of the
18 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

19 2. The Commission has jurisdiction over Applicant and the subject matter of the
20 application.

21 3. Notice of the application was given in accordance with the law.

22 4. Staff's recommendations set forth in Findings of Fact Nos. 8, 9, 10, and 11 are
23 reasonable and should be adopted.

24 ORDER

25 IT IS THEREFORE ORDERED that the application for Ernest Communications, Inc. for a
26 Certificate of Convenience and Necessity for authority to provide competitive local exchange
27 telecommunications services as a reseller shall be and the same is hereby granted, except that Ernest
28 Communications, Inc. shall not be authorized to charge customers any prepayments, advances, or

1 deposits. In the future, if Ernest Communications, Inc. desires to initiate such charges, it must file
2 information with the Commission that demonstrates the Applicant's financial viability or establish an
3 escrow account equal to the amount of any prepayments, advances or deposits.

4 IT IS FURTHER ORDERED that Ernest Communications, Inc. shall comply with the Staff
5 recommendations set forth in Findings of Fact Nos. 8, 9, 10 and 11.

6 IT IS FURTHER ORDERED that this docket shall remain open for a period of 60 days in
7 order for Ernest Communications, Inc. to file fair value information, if it so chooses.

8 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

9 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

10
11
12 CHAIRMAN

COMMISSIONER

COMMISSIONER

13
14 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
15 Secretary of the Arizona Corporation Commission, have
16 hereunto set my hand and caused the official seal of the
17 Commission to be affixed at the Capitol, in the City of Phoenix,
18 this ____ day of _____, 2000.

19 BRIAN C. McNEIL
EXECUTIVE SECRETARY

20 DISSENT _____
21 AG:bbs
22
23
24
25
26
27
28

1 SERVICE LIST FOR: ERNEST COMMUNICATIONS, INC.

2 DOCKET NO.: T-03631A-98-0540

3 Paul Masters
ERNEST COMMUNICATIONS, INC.
4 6475 Jimmy Carter Boulevard, Suite 300
Norcross, Georgia 30071

5
6 Maureen Arnold
QWEST CORPORATION
3033 North Third Street, Suite 1010
7 Phoenix, AZ 85012

8 Timothy Berg
FENNEMORE CRAIG
9 3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012
10 Attorney for Qwest Corporation

11 Lyn Farmer, Chief Counsel
Legal Division
12 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
13 Phoenix, AZ 85007

14 Deborah Scott, Director
Utilities Division
15 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
16 Phoenix, AZ 85007

17

18

19

20

21

22

23

24

25

26

27

28

[REDACTED]